



CITY OF LODI

COUNCIL COMMUNICATION

AGENDA TITLE: Discuss Engagement Of An Additional Opinion Regarding The PCE/TCE (Environmental Abatement Program) Matter

MEETING DATE: September 17, 2003

PREPARED BY: City Clerk

RECOMMENDED ACTION: That Council discuss the matter of obtaining an additional opinion regarding the environmental abatement program relative to PCE/TCE groundwater contamination and take appropriate action, if desired.

BACKGROUND INFORMATION: At the August 6 and August 20, 2003 City Council meetings, Council Member Hansen requested that this matter be placed on the agenda for discussion and possible action. Additionally, Mayor Hitchcock noted at the meeting of August 6 that she had previously made several requests for this topic to be placed on an agenda. Pursuant to these requests, the matter now appears before Council for consideration.

FUNDING: None required.

A handwritten signature in cursive script, reading "Susan J. Blackston".

Susan J. Blackston
City Clerk

SJB/jmp

APPROVED:

A handwritten signature in cursive script, reading "H. Dixon Flynn".
H. Dixon Flynn -- City Manager

Jennifer Perrin

From: Pixler, Susan [PixlerS@saccourt.com]
Sent: Wednesday, September 17, 2003 3:30 PM
To: Susan Blackston; Susan Hitchcock; Emily Howard; Keith Land; John Beckman; Larry Hansen
Subject: 9/17/03 Agenda Item I-2

Honored Mayor and Councilmembers: Unfortunately, I will be unable to attend tonight's council meeting. I am very concerned about the open session discussion regarding the groundwater contamination litigation. I attach at the end of this message portions of the recent California Supreme Court decision regarding litigation, settlement, and the Brown Act, for your review.

This should not be construed as legal advice. Mr Hays, or possibly Mr. Beckman, can cite you the state of the law on this. My own thoughts are that a second opinion is not the correct solution to concerns raised recently by council members. Think of the council as the "control" group of a corporation, i.e, the Board of Directors, officers, etc. Your duty of disclosing information to the Lodi public is similar to their duty to shareholders. However, once litigation is involved, the obligations of the control group are to direct the litigation in a manner that holds the best interests of the respective constituency as the tantamount goal. That is why there exists a litigation exception. If you are unhappy with the way counsel (both Mr. Hays and Mr. Donovan) is handling the litigation, or with the lack of information that is being provided to you about the litigation, your first recourse should be to demand a comprehensive written status report from counsel answering all of your questions. If you are not satisfied with what you receive, you don't believe further warnings will work, and you believe that you are being misled by your counsel, fire them. (In the case of Mr. Hays, you could remove him from the case.) I am not suggesting that you do so, but that this is the better procedure. You should be prepared for litigation over your contract with Mr. Donovan. You interview other counsel - in private, under the litigation exception to the Brown Act - and obtain their perspectives and how they would handle the litigation should they be selected to represent the City of Lodi. As I understand it at this time, there is no purpose to asking another attorney to review the past work of your attorneys.

I see the problems with asking for simply a second opinion as follows:

You could get 50 second opinions from different counsel and they are not going to agree. Of course, only counsel with a detailed understanding of the facts and the specialized body of law is going to have an opinion worth any weight.

I am assuming that the second opinion would not be public? See the Supreme Court case excerpt below.

What are you asking a second opinion of? The merits of the lawsuit, the conduct of counsel, a risk/benefit analysis?

One related thought - from what I have read in the newspaper, it seems to me that opposing counsel are ethically barred from talking to council members about the subject matter of the litigation - which includes all aspects. Councilmembers are represented by counsel, and all communications from opposing counsel must go through Mr. Hays, just as Mr. Hays cannot go out to discuss the lawsuit with one of the named defendants or insurers. the subject of the litigation should be strictly off limits. Councilmembers also hold the attorney client privilege for the benefit of the City of Lodi. That privilege should not be waived by discussing the lawsuit with third parties. Again, I am sure that Mr. Hays has so advised you.

There is a lot at stake here. I urge you all to treat this in the best interests of Lodi, and to leave politics out of it. This is a complex situation, the law is not set, and the decision must be made by you, our elected representatives. This is simply not a situation where the voters of Lodi should be telling you what you should do based on less than all of the facts.

From Southern California Edison co. v. Peevey (2003) CA S.Ct.: PUC contends taking this

action in closed session did not violate the Bagley-Keene Act, but, rather, was permitted under an exception to the law's open meeting requirement, Government Code section 11126, subdivision (e)(1), which provides as follows: "Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation." We agree. On its face, subdivision (e)(1) permits a body only to "confer with" and "receive advice from" its attorney regarding litigation. But subdivision (e)(1) must be read in light of its purposes and in consonance with a closely related provision of the Bagley-Keene Act, Government Code section 11126.3, subdivision (a), which allows a body to withhold the identity of litigation to be considered in closed session if to identify it would "jeopardize its ability to conclude existing settlement negotiations to its advantage." (Italics added.) Read in light of its purposes and in that statutory context, Government Code section 11126, subdivision (e)(1) was, as will be seen below, clearly intended to permit the body not only to deliberate with counsel regarding a settlement, but actually to settle the litigation in a closed session when closure is deemed necessary to avoid prejudice to a favorable settlement.

Settlement discussions with counsel are obviously an aspect of litigation particularly vulnerable to prejudice through public exposure and are thus one of the areas Government Code section 11126, subdivision (e)(1) was centrally intended to shelter from public revelation. In *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal. App. 2d 41, the court held that the enactment of the Ralph M. Brown Act (Gov. Code, §§ 54950-54962; hereafter Brown Act), the open meeting law applicable to local public entities, was not intended to remove protection of the attorney-client privilege from local government bodies' deliberations with their attorneys concerning litigation. Public entities have as great a need for confidential counsel from their attorneys as private litigants and should not be put at a disadvantage in litigation by depriving them of that essential assistance. (*Sacramento Newspaper Guild*, supra, at p. 55.) In particular, the court explained, a public entity's discussion with counsel about possible settlement must occur in private, for such conferences require a frank evaluation of the case's strengths and weaknesses, and "[i]f the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness." (Id. at p. 56; accord, *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373-374.) The Legislature subsequently added protective provisions to both the Bagley-Keene and Brown Acts, vindicating the view expounded in *Sacramento Newspaper Guild*. Both new provisions were phrased in the language of current Government Code section 11126, subdivision (e)(1). (See Stats. 1981, ch. 968, § 12, p. 3690, adding former subd. (q) to Gov. Code, § 11126; Stats. 1984, ch. 1126, § 3, p. 3802, adding Gov. Code, § 54956.9.)

In 1992, the California Attorney General's Office construed Government Code section 54956.9, the Brown Act provision paralleling Government Code section 11126, subdivision (e)(1), as authorizing a public entity to act on a settlement proposal, as well as deliberate on it, in closed session with its counsel. (75 Ops.Cal.Atty.Gen. 14 (1992).) The Attorney General noted, first, that the Brown Act's "personnel exception" (Gov. Code, § 54957) has been construed to permit closed-session action on appointments and dismissals (see *Lucas v. Board of Trustees* (1971) 18 Cal. App. 3d 988, 991), even though on its face the statute authorizes only a closed session to "consider" such personnel matters. "The parallel between section 54957 ('to consider') and section 54956.9 ('to confer') warrants similar treatment." (75 Ops.Cal.Atty.Gen., supra, at p. 19.)

The same parallel may be drawn between the corresponding provisions of the Bagley-Keene Act. HN11Subdivision (a)(1) of Government Code section 11126 permits closed sessions "to consider" personnel matters. Though case law has not yet addressed the point, we note that the immediately following provision, subdivision (a)(2), refers to "any disciplinary or other action taken against any employee at the closed session," indicating that the Legislature intended, in the Bagley-Keene Act as (according to the Attorney General) in the Brown Act, that the government body could not only deliberate, but act, in closed session. The language used in Government Code section 11126, subdivision (e)(1), permitting a body "to confer" with counsel on settlement of pending litigation, is not so dissimilar to that in subdivision (a)(1) ("to consider") as to warrant a different interpretation.

Interpreting the Brown Act counsel provision, the Attorney General also reasoned that consultation with counsel in the course of litigation often focuses on possible action--e.g., whether to file a suit or countersuit, what claims and defenses to plead, what

parties to join. Conferring with counsel on these matters necessarily includes deciding on a course of action and instructing or authorizing counsel to pursue it. The same applies to settlement discussions. "Unless a local agency is to be a 'second class citizen' with its opponents 'filling the ringside seats' (Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra, 263 Cal. App. 2d at p. 56), it must be able to confer with its attorney and then decide in private such matters as the upper and lower limits with respect to settlement, whether to accept a settlement or make a counter offer, or even whether to settle at all. These are matters which will depend upon the strength and weakness of the individual case as developed from conferring with counsel. A local agency of necessity must be able to decide and instruct its counsel with respect to these matters in private." (75 Ops.Cal.Atty.Gen., supra, at pp. 19-20.)